of insanity as a defence. We think that we should cite the whole passage:

"The question in the present appeal is the way in which a jury should be directed in a case of murder where one of the special exceptions or one of the general exceptions has been put forward as a defence. And here let me say that nothing that is said here is to be taken as having any necessary application to the question of insanity as a defence. That is a defence which has been generally regarded as standing in a class of its own, and in the present case we have excluded it from our consideration."

It will be noticed from the above two passages that Thomson C.J. intended to say, first, that the principle laid down in that judgment would equally apply to any of the general exceptions put forward as a defence, and that therefore that principle applies to a case of self-defence. Secondly, he also stressed that what he was saying in that judgment was not intended to apply to a defence of insanity.

The learned president in the present case declined to apply the principle in the *Abdul Manap's* case[9] merely because in his view that case dealt with self-defence under the Penal Code and not with a specific presumption under the Customs Ordinance. He did not go on to say that he did not accept the principle laid down by the learned judge in relation to the question of self-defence.

Going back to *Fatimah's* case, we can find nothing in Hepworth J's judgment in that case to suggest that he used the words "proof to the satisfaction of the court" to mean "proof beyond reasonable doubt," nor can it be said that he intended to lay down any principle as to the quantum of proof placed on the defence to rebut a presumption, since he was merely considering the questions as to whether on the facts disclosed by the prosecution there was a case for the defence to answer. We agree, however, that if in the present case the learned president, in following *Fatimah's* case, convicted the appellants on the ground that they had failed to prove their case beyond reasonable doubt, especially when nowhere in his grounds of decision did he use the words "balance of probabilities," as pointed out by Dato' Marshall, he misdirected himself as to the quantum of proof required of them.

We have already stated the findings of fact which the learned president made with regard to the evidence of each of the witnesses for the defence. He did so after a very careful analysis of the evidence, and he rejected the evidence of each one of them either on the ground that the witness was unreliable because his evidence appeared improbable to him or because of his demeanour in the witness box. In our view, therefore, he had the right test in mind when he said that the defence had not discharged the burden of proof under section 115 of the Customs Ordinance or rebutted the presumption under section 131(2) of the Ordinance. His findings on questions of fact on the evidence before him have not been challenged in this court, and in our judgment they are unassailable. Where a court says of the defence evidence that it is improbable and/or unreliable, we do not see how it can possibly be said that on that evidence the defence had proved its case on a balance of probabilities or had even raised a reasonable doubt as to the prosecution case.

As we have said, we agree that the learned president probably misdirected himself in applying *Fatimah's* case. The effect of that would therefore be that he had failed to direct his mind properly on the law as to quantum of proof placed on the defence in such a case as the instant one. In our view, however, that failure to direct his mind properly on the question of law has not occasioned any substantial miscarriage of justice because he had rejected the evidence of each of the witnesses produced by the defence *in toto* and in so doing had applied the correct principle.

The order as regards the disposal of the appeal would be that it do stand dismissed.

Appeal stand dismissed.

Solicitors: *T. C. Tang & Co.*

KIAN HIN & CO. LTD. v. KAN YEOW WING

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) March 2, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 85 of 1969]

Contract — Sale of land and house — Deposit paid — Balance of purchase price unpaid — Rescission of contract — Whether interest payable on balance of purchase price.

The appellants sold a house to the respondent. The respondent entered into possession of the house but did not pay the balance of the purchase price. The appellants sued the respondent and obtained judgment for possession of the house and were also allowed to retain the deposit. The appellants in this appeal claimed that they were entitled to interest on the balance of the purchase price.

Held, dismissing the appeal: as the contract was treated as rescinded in this case, the appellants were not entitled to the interest claimed.

Cases referred to:-

(1) *K. Arumugam* v. *J.K.R. Leonard* [1936] M.L.J. 252.

(2) *Chajmal Das* v. *Brij Bhukan Lal & Anor.* (1895), I.L.R. 17 All. 511; 22 I.A. 199.

(3) *Fludyer* v. *Cocker* (1805), 12 Ves. Jun. 25; 33 E.R. 10.

(4) *E.F. Barber* v. *J.C. Wolfe* [1945] 1 All E.R. 399.

(5) *Hall* v. *Burnell* [1911] 2 Ch. 551.

The following cases were also cited in argument: *Farrant* v. *Olver* (1922) 91 L.J. Ch. 758, 759; [1922] All E.R. Rep. 783; *Lowe* v. *Hope* [1969] 3 All E.R. 605; *Hutchins* v. *Humphreys* (1885) 54 L.J. Ch. 650; *Essex* v. *Daniel* L.R. 10 C.P. 538, 553.

FEDERAL COURT.

Atma Singh Gill for the appellants.

Edgar Joseph Jr. for the respondent.

Cur. Adv. Vult.

Azmi L.P.: I agree that the appeal be dismissed with costs for reasons given in the judgment of my brother Suffian F.J.

Suffian F.J.: The plaintiffs, a limited liability company, are developers. They sold a terrace house at Lobak Road, Seremban, to the defendant. The price was $22,100. The defendant paid $6,323.75 by way of deposit towards the purchase price, leaving a balance of $15,776.25. Somehow or other the defendant con-

trived in March 1960 to move into the house before full payment and completion of the deal. There then arose various arguments regarding the price. Eventually in May 1960 the parties agreed that the balance payable be reduced to $14,700. Still the defendant failed to pay.

The plaintiffs sued him in 1961. The High Court gave judgment in their favour, ordering the defendant to give up possession of the house to the plaintiffs and authorizing the plaintiffs to retain the deposit of $6,323.75.

The plaintiffs are dissatisfied. They want more. They say that the defendant had occupied the house rent-free from March 1960 until the day of judgment and that the house could have been rented for $120 per month. They say that the learned judge should also have ordered the defendant to pay interest on the balance of the purchase price, *i.e.*, on $14,700. They say that, if the defendant had borrowed from a building society, he would have had to pay 7½% interest and therefore the defendant should be ordered to pay the plaintiffs 7½% interest on the balance from May 1960 (when the final price was agreed) until the date of payment. Alternatively they say that the defendant should pay interest at that rate until the date of judgment and thereafter until the date of realization at 6%.

Mr. Atma Singh relies on *K. Arumugam* v. *J.K.R. Leonard*,[1] *Chajmal Das* v. *Brij Bhukan Lal and Another*[2] and *Fludyer* v. *Cocker*.[3] He also cites passages from *Halsbury's* Laws of England, 3rd Edition, Volume 34, and from Contracts and Conditions of Sale of Land by *E. O. Walford*, 2nd Edition.

From the former I need only reproduce the following:

"Where the contract is silent as to the time for completion and payment of interest, interest is payable ... from the time when the vendor has made out his title so that the purchaser can safely take possession. ... If the purchaser is let into possession ... interest begins to run on the unpaid purchase-money from the time of possession, unless otherwise agreed." (paragraph 502);

and from the latter the following:

"Under an open contract it is well settled that a purchaser is liable to pay interest on the purchase-money from the date when he could prudently take possession..." (page 35)

"A purchaser in default who has paid a deposit is liable to pay interest only on the balance of the purchase-money..." (page 36).

With respect to Mr. Atma Singh, I do not think that the vendors here are entitled to any interest at all on the balance of the purchase-money.

A clear distinction must be drawn between specific performance on the one hand and rescission on the other. If specific performance had been decreed, the defendant would have to complete the deal by paying the balance of the purchase-money whereupon the house would be transferred to him, and in my opinion it is only in such a case that the defendant may be ordered also to pay interest on the balance of the purchase-money which he has unjustly delayed paying. But that is not the case here. The learned trial judge did not order the uncompleted deal to be completed. He ordered the recalcitrant buyer to give up possession and forfeit his deposit. In other words he treated the agreement as rescinded. Romer J. (as he then was) in *E. F. Barber* v. *J. C. Wolfe*[4] held that where there was rescission damages would not be granted for breach of the contract rescinded. In that case the defendant was a tenant of a house belonging to the plaintiff. She bought the house and paid a deposit. She did not complete and the plaintiff brought an action for specific performance. He won. Still the defendant failed to complete on the appointed date. So the plaintiff returned to court asking for rescission and forfeiture of the deposit. He made three additional claims:

(i) that the defendant should pay £142 8s. 11d. for *mesne* profits, being 5 per cent on the purchase price from 21st December, 1944, to the time of the motion;

(ii) that the defendant was liable for damages for breach of contract; or alternatively

(iii) that the defendant, having been in possession or control of the property, was bound to pay an occupation rent.

The court dismissed all these three additional claims. As regards the first additional claim, Romer J. said at page 400:

"It seems to me that the result of rescinding the contract is, at all events for this purpose, to rescind it *ab initio*, with the result that the plaintiff is not entitled to the moneys payable under any particular clause [of the contract].."

As regards the second and third additional claims, Romer J. said on the same page:

"... if the plaintiff [asks the court for the rescinding of the contract], I thought it was abundantly established that he could not, at the same time, obtain damages for the breach of the contract which he was asking the court to rescind, and I still believe that to be the practice. The relevant cases are summarised in 3 *Seton*, Judgments and Orders, 7th Edn., p. 2220, and they range over a considerable period of time, the last one being a decision of Eve, J. in *Hall* v. *Burnell*.[5] Whatever the foundation of the rule is, I am not sure that it is necessary to inquire into it at the present moment. If that is established, as I think it is, it seems to me that only a decision of a higher court can introduce some new rule."

Here too the plaintiffs asked for rescission, got it and they should not at the same time receive interest on the balance of the purchase-money. I would therefore dismiss the appeal with costs.

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *Atma Singh Gill & Co.; Joseph & Son.*